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Revising the Consumer Acquis: (Half) Opening the Doors of the Trojan Horse

JACOBIE W. RUTGERS AND RUTH SEFTON-GREEN*

Abstract: This paper investigates the Green Paper's proposals for the revision of the Consumer *Acquis* from the angle of public consultation. The Green Paper asks many abstract questions; however, the crucial question of whether Europe needs and/or wants a European Consumer Code has not been addressed. The rhetorical use of leading questions seems to lean in one direction, which is a horizontal instrument embracing maximum harmonization. The imperatives of the Green Paper are highly political and not merely technical, as the Commission seems to suggest. Only two policy-oriented goals are mentioned, yet others need to be identified and pursued, such as the appropriate level of consumer protection. First, this paper adopts a critical methodological enquiry to examine the Commission's leading questions technique, as well as indicates that the presentation of its report on the outcome of public consultation is not entirely neutral. Next, the option of a horizontal instrument is discussed more fully. It would seem that more empirical evidence is required to convince us of that such an instrument is workable and effective. Finally, the appropriate level of harmonization – minimum or maximum – is investigated. Arguments against 'full targeted harmonization' are given. It is suggested that the Commission is not telling us the full story.

Résumé: Les propositions du Papier Vert pour la révision de l'acquis communautaire seront examinées dans cet article sous l'angle de la consultation publique. Le Papier Vert pose beaucoup de questions abstraites, mais ne pose pas celle, cruciale, qui consiste à savoir si l'Europe a besoin et/ou souhaite un Code européen de la consommation. L'utilisation d'une technique de rhétorique semble conduire dans une seule direction, à savoir l'adoption d'un instrument horizontal englobant l'harmonisation maximale. Les impératifs du Papier Vert sont hautement politiques et pas simplement techniques, comme la Commission le laisse entendre. Seuls deux buts politiquement orientés sont mentionnés, alors qu'il est nécessaire d'identifier et poursuivre d'autres, tel le degré approprié de protection des consommateurs. D'abord, une analyse critique et méthodologique sera entreprise pour examiner la technique de la Commission consistant à poser des questions directives. Nous constatons également que la présentation de l'issue de la consultation publique faite par la Commission dans son rapport est loin d'être neutre. Ensuite, l'option de l'instrument horizontal sera considérée plus en profondeur. Il semblerait qu'il faille apporter davantage de preuves empiriques afin de nous convaincre qu'un tel instrument sera opérationnel et effectif. Enfin, le degré approprié – minimal ou maximal – de protection des consommateurs sera étudié. Des arguments contre l'harmonisation ciblée et maximale seront discutés. Il nous semble que la Commission ne nous révèle pas toute l'histoire.

Zusammenfassung: Dieser Beitrag untersucht die Vorschläge im Grünbuch über die Überprüfung des gemeinschaftlichen Besitzstands im Verbraucherschutz aus Sicht einer öffentlichen Konsultation. Das Grünbuch wirft viele abstrakte Fragen auf. Dagegen wird

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die entscheidende Frage, ob nämlich Europa ein Europäisches Verbrauchergesetzbuch überhaupt braucht, nicht gestellt. Die rhetorische Verwendung von Suggestivfragen scheint allerdings in eine Richtung hinzudeuten, nach der eine horizontale Maßnahme einzuführen ist, die eine maximale Harmonisierung umfasst. Die Aussagen im Grünbuch sind von höchst politischer und kaum von technischer Art, wie die Europäische Kommission scheint anzunehmen. Lediglich zwei politisch orientierte Ziele werden genannt. Dagegen müssen andere Ziele noch herausgearbeitet und weiterentwickelt werden. Hierzu zählt zum Beispiel die Frage nach dem maßgeblichen Umfang des Verbraucherschutzes. Zunächst soll in diesem Beitrag eine kritische methodologische Untersuchung erfolgen, in der die Technik der Fragestellung der Europäischen Kommission untersucht werden soll sowie auch aufgezeigt werden soll, dass die Präsentation ihres Berichts über die Ergebnisse der öffentlichen Anhörung nicht völlig neutral ist. Anschließend soll der Vorschlag zur Einführung einer horizontalen Maßnahme ausführlich untersucht werden. Dabei erscheint es, dass mehr empirische Beweise erforderlich sind, um uns überzeugen zu können, dass ein solches Instrument funktionsfähig und effektiv ist. Schließlich soll der maßgebliche Harmonisierungsumfang untersucht werden: minimale oder maximale Harmonisierung. Dabei sollen die Argumente gegen eine „umfassende Vollharmonisierung“ gegeben werden. Zudem wird angenommen, dass die Europäische Kommission uns die volle Wahrheit nicht erzählt.

1. Introduction

The European Commission first introduced the Common Frame of Reference (CFR) in its Action Plan of 2003.¹ Subsequently, the CFR earned the nickname of a Trojan Horse.² The CFR project has gotten well under way since then³ and a distinction can be made between an academic CFR and the actual or political CFR.⁴ Consultation via stakeholders is one of the key features of the CFR project. Within the CFR, consultation of civil society takes place by means of workshops, which are organized by

¹ *A More Coherent European Contract Law: An Action Plan*, COM (2003), 68 final.

² H. COLLINS, 'The "Common Frame of Reference" for EC Contract Law: A Common Lawyer's Perspective', in *L'Armonizzazione Del Diritto Privato Europeo*, ed. M. MÉLI & M.R. MAUGERI (Giuffrè: 2004); The House of Lords Report on European Contract Law, April 2005, House of Lords, European Union Committee, 12th Report of Session 2004-05, *European Contract Law: The Way Forward?*, report with evidence, HL Paper 95, nos 62 et seq.

³ See B. LURGER, 'The Common Frame of Reference/Optional Code and the Various Understandings of Social Justice in Europe', in *Private Law and the Many Cultures of Europe*, ed. T. WILHELMSSON, E. PAUNIO & A. POHJOLAINEN (Kluwer, 2007), 177-199, for an illuminating enquiry of how the CFR could lead in turn to an optional instrument and the various implications of this development on social justice. In an attempt to avoid the rather gloomy scenarios posed by the optional instrument, the author suggests that the optional instrument should be proposed as a model for Member States and not for contracting parties.

⁴ See C. VON BAR et al., *Draft Common Frame of Reference* (Sellier, 2008), 3-4; Cf. *Report from the Commission, Second Progress Report on the Common Frame of Reference* (Brussels, 25 July 2007), COM (2007), 447 final, 12 (hereafter 'Second Progress Report').

the European Commission. The European Commission invites the stakeholders to these workshops.⁵

On 8 February 2007, the Commission published a Green Paper on the Review of the Consumer *Acquis*, in which it asked the public a number of questions with respect to the revision of the Consumer *Acquis*.⁶ The European Commission placed this consultation within the context of its White Paper on Good Governance⁷ and its Communication '[t]owards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission'.⁸ At the end of September 2007, a 'Commission Staff Working Paper, Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer *Acquis*' (hereafter the 'Outcome of Public Consultation Report') was published on the website of Directorate General Consumer Policy, and in the beginning of November an analytical report by the Consumer Policy Evaluation Consortium was published.⁹ The Commission's whole initiative of asking for public consultation and reporting back on the replies is welcome.

However, when examining the Green Paper from the angle of public consultation, several questions arise, such as: are the right questions being asked? Is the objective of public consultation one of transparency? Is transparency attained and with what degree of success? These questions and the Commission's Outcome of Public Consultation Report form the wider backdrop of this paper.

As an illustration of the Commission's consultation methods, the Green Paper provides an interesting case study. Is the public capable of answering the kind of questions asked or do the latter use too many technical legal terms? Have all the relevant issues been addressed? Why is the enquiry concentrated on just the Consumer *Acquis* and restricted to only eight directives in this area? How does this Green Paper fit with the CFR project and the draft CFR (DCFR)? The Green Paper only mentions

⁵ See H. BEALE, 'The European Commission's Common Frame of Reference Project: A Progress Report', *European Review of Contract Law* (ERCL) (2006): 303; 'The Future of the Common Frame of Reference', ERCL (2007): 257, 272-274.

⁶ European Commission, *Green Paper on the Review of the Consumer Acquis*, (Brussels, 8 February 2007), COM (2006), 744 final (hereafter the 'Green Paper'); see also C. PONCIBÒ, 'The Challenges of EC Consumer Law', EUI Working Papers (MWP, 2007), 24.

⁷ European Governance, *A White Paper*, (Brussels, 25 July 2001), COM (2001), 428 final.

⁸ *Commission Staff Working Paper, Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis*, 2 (hereafter the 'Outcome of Public Consultation Report').

⁹ *Analytical Report on the Green Paper on the Review of the Consumer Acquis* by Consumer Policy Evaluation Consortium, in *Preparatory Work for the Impact Assessment on the Review of the Consumer Acquis*, DG Health and Consumer Protection, 6 November 2007 (hereafter the Analytical Report on the Green Paper), <http://ec.europa.eu/consumers/rights/detailed_analysis_en.pdf>.

the CFR once,¹⁰ a point that has been criticized.¹¹ The Second Progress Report on the CFR, published in July 2007, simply confirms that the link between these two projects is still unclear.¹² At present, it looks as if the Commission has not yet made up its mind on how to link together the revision of the Consumer *Acquis* and the CFR projects, although it reiterates that it has no intention to produce a European Civil Code.¹³

In reality, the genuine issue of the Green Paper is whether Europe needs and/or wants a European Consumer Code that applies to both domestic and cross-border transactions rather than just a revision of eight directives in the area of the Consumer *Acquis*.¹⁴ However, this question has not been raised and is disguised by all the other questions. Nevertheless, the Commissioner for Consumer Protection, Meglena Kuneva, said recently that one of the objectives of her consumer strategy was ‘to establish a single, simple set of rights and obligations Europe-wide’.¹⁵ Taking into account all this and the summary by the Commission of the responses to the Green Paper, the horizon is sufficiently hazy for us to speculate that the Commission may come up with a proposal to produce a European Consumer Code instead, which it calls a ‘horizontal instrument embracing maximum harmonization’, a so-called back-door approach.¹⁶

We will discuss a limited number of issues that are raised in the Green Paper from a critical standpoint. First, a few general remarks will be made about the type of questions and the methodological consequences of the approach taken in the Green Paper. Subsequently, the Commission’s Outcome of Public Consultation Report will be briefly examined. Finally, we will focus on two issues: the horizontal instrument and the level of harmonization.

¹⁰ Green Paper, n. 6 above, 4.

¹¹ Outcome of Public Consultation Report, n. 8 above, 12, where it is noted that ‘several stakeholders asked for clarification regarding the relationship between a future horizontal instrument and ... the CFR’.

¹² Second Progress Report, n. 4 above, 2 & 10–11.

¹³ *Ibid.*, 11.

¹⁴ M.W. HESSELINK, ‘Naar een (Europees) wetboek van consumentenrecht?’, *Nederlands Juristenblad* (NJB) (2007): 850, 853; M.W. HESSELINK, ‘Een Europees Burgerlijk Wetboek door de voordeur’, NJB (2007): 39; V. HEUTGER, ‘Der Abschluss der Diagnosephase zum Europäischen Vertragsrecht – Das Grünbuch 2007’, *European Review of Private Law* (ERPL) (2007): 723–724.

¹⁵ M. KUNEVA, European Commissioner for Consumer Protection, ‘European Consumer Policy in the 21st Century’, speech given at the Challenges and Opportunities for the Transatlantic Agenda conference at Harvard University (Cambridge, 2 October 2007), <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/588&format=HTML&aged=0&language=EN>>.

¹⁶ Cf. M.T.J. BOUWES, ‘Harmonisatie van het burgerlijk recht door de achterdeur, Een Common Frame of Reference’, NJB (2005): 944–948; F. JENSMA, ‘Europees Wetboek via de achterdeur’, *NRC Handelsblad*, 4 October 2007.

2. The Technique of ‘Leading Questions’

The objectives of the Commission are set out in the first part of the Green Paper; however, the core is in the annexes, which contain a series of questions and a choice of options. Yet the burning issue – namely, does Europe need and/or want a European Consumer Code? – has not been addressed. The Green Paper asks a number of abstract questions, many of which concentrate on form rather than content. Without examining the real content of the rules concerned, it is difficult to answer these questions.¹⁷ Indeed, it may be preferable to suggest and to evaluate alternative concrete rules and their relationship with other areas of (contract) law rather than focusing exclusively on the form of legislation. The need to openly reveal the policy objectives of contract-law legislation has already been highlighted in the Manifesto for Social Justice.¹⁸ These imperatives are highly political and not merely technical, as this Green Paper suggests.¹⁹ For example, the Commission identifies two policy-oriented (regulatory) goals, which are promoting consumer confidence and lessening market barriers. However, these are not the only goals that need to be identified and pursued. The appropriate level of consumer protection is also a primary objective on which consensus needs to be obtained. Such consensus can never be achieved if no discussion takes place.

Secondly, it is obvious that many questions are inter-related.²⁰ In many instances, a question cannot be answered without taking into account another one. For instance, it is difficult to answer Question 1 concerning the issue as to whether there should be either just a revision of the individual directives, a horizontal approach or no revision, without taking into account Question 3, which concerns the degree of harmonization.

The phrasing of the questions also suggests a leading-questions approach. For example, Question 1 asks what the best approach to the review of consumer legislation is. However, the following questions only seem to concern the horizontal approach. This is particularly obvious in Question 2, which steers in one direction: ‘what should be the scope of a possible horizontal instrument?’²¹ In other words, it seems that certain options, which are not in fact real options, are included for the sake of appearances.

¹⁷ Cf. the response of H. BEALE & H. SCHULTE-NÖLKE, response submitted on behalf of the Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (*Acquis Group*), Question A3, 3.

¹⁸ Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: A Manifesto’, *European Law Journal* (ELJ) (2004): 653–674.

¹⁹ Cf. D. KENNEDY, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’, *ERPL* (2001): 7–28.

²⁰ Cf. BEALE & SCHULTE-NÖLKE, n. 17 above, answer to Question A3, 3.

²¹ Green Paper, n. 6 above, 14.

Moreover, the attempt to answer some of the questions only led to the need to address many more questions that were not asked. One of the crucial questions left unaddressed is whether the horizontal instrument should be either a directive or a regulation. This issue is also related to that of minimum harmonization, as will be discussed in section 5 below.

In short, the Green Paper asks many questions, but not necessarily the right ones, in our view.²² The apparent exhaustiveness of the issues raised cleverly disguises the fact that many crucial questions remain unasked.

3. The Commission's Outcome of Public Consultation Report

From the website of the European Commission, it follows that approximately thirty countries, Member States and non-Member States alike, responded to the questions of the European Commission, as well as approximately thirty academics or groups of academics, forty-one consumer organizations, five European Consumer Centres, 188 businesses, and twenty other stakeholders.²³ In its Executive Summary, the European Commission comes to the conclusion that 'a majority of respondents call for the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e.[.] targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border'.²⁴ However, the responses to the Green Paper can be distinguished in different ways. For instance, the Member States can be discerned from the consumer organizations, which in turn can be distinguished from the business sector's responses. Therefore, it seems too simplistic to state that a majority of the responses is in favour of full targeted harmonization. This also can be deduced from the Commission's working document itself. The answers are elaborated upon in subsequent pages.²⁵

²² Other academic replies published on the site tend to agree. See, for example, the replies submitted by H.W. MICKLITZ & N. REICH; S. WHITTAKER and Joint Response of the Society of Legal Scholars and the Northern Commercial Law Group and the Consumer Academic Network (hereafter the 'Joint Response'), <http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/index_en.htm>.

²³ Cf. Analytical Report on the Green Paper, n. 9 above, 5. The numbers of responses in the different categories – business sector, consumer groups, public authorities, academics, legal practitioners, and others, listed in the Analytical Report – do not seem to correspond to those mentioned on the website of the European Commission, <http://ec.europa.eu/consumers/rights/responses_green_paper_acquis_en.htm>.

²⁴ *Outcome of Public Consultation Report*, n. 8 above, 3.

²⁵ *Ibid.*, 4. For instance, with respect to the question of whether minimum or maximum harmonization is desirable.

4. The Horizontal Instrument Option

A horizontal instrument is one of the options put forward in reply to the question as to which is the best way of reviewing consumer legislation.²⁶ Horizontal harmonization, in the context of reviewing the Consumer *Acquis*, is tantamount to a proposition to create a specific code of consumer law.²⁷ This proposal cannot be approved or rejected without a fuller enquiry into the objectives, scope, and consequences of such an instrument. Yet the Commission presents the option as if it is disconnected to questions about the level of harmonization and the notion of consumer. This is misleading, to say the least.

4.1 *The Objectives behind a Horizontal Instrument*

In its Green Paper, the Commission identifies explicitly promoting consumer confidence and lessening market barriers.²⁸ However, the explicit justification of these objectives does not preclude the existence of other implicit objectives. The objectives of a horizontal instrument require, first and foremost, an enquiry into the content of the rules contained therein. These are essentially political and sensitive issues.²⁹ As indicated above, the appropriate level of consumer protection is a primary objective on which consensus needs to be obtained.³⁰ This entails setting up a widespread consultation process both for Member States and stakeholders, as the Green Paper and CFR have put into process,³¹ but it also requires consultation on the crucial issues.

If a horizontal approach is adopted, it will be necessary to demonstrate empirically that it will be the most effective means of solving the perceived problems of fragmentation of rules, the existing regulatory gap, and so on, and more positively, an effective way of establishing consumer confidence³² and lessening barriers on the internal

²⁶ Option 2 of Question A1, European Commission, Green Paper, n. 6 above, 14, is in fact the only feasible option out of the three proposed by the Commission.

²⁷ See MICKLITZ & REICH, 'European Consumer Law-quo vadis?', n. 22 above. The authors suggest that the revision of the *acquis* must be set in the context of the mandate given to the Commission in Tampere in 1999. However, they also suggest that the revision of the *acquis* represents a creative break on the part of the Commission (3). This has led them to raise a valuable criticism: Is the revision of eight directives sufficient to justify a total review of the *acquis* (4-6)? See 4.4 below.

²⁸ About these aims, see H. UNBERATH & A. JOHNSTON, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', *Common Market Law Review* (CML Rev.) (2007): 1237, 1242, 1244 et seq.

²⁹ M.W. HESSELINK, 'The Politics of a European Civil Code', *ELJ* (2004): 675, 684.

³⁰ The transposition of Directive 1985 on product liability has already given rise to ECJ decisions on this very point. Case C-52/00 *Commission v. France* [2002] ECR I-3827; Case C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR I-3901.

³¹ See First Annual Progress Report on European Contract Law and the *Acquis* Review, COM (2005), 456 final; Green Paper, n. 6 above, 4; Second Annual Progress Report, n. 4 above.

³² See MICKLITZ & REICH, n. 22 above, 6, who highlight the Commission's assumption that lack of consumer confidence is connected to minimum harmonization and the divergences that have resulted. Is it actually proven that divergence has a detrimental effect on consumer confidence in the

market. It is doubtful that such empirical evidence of its workability and effectiveness can be adduced. For example, if a framework instrument gives rise to varying interpretations in different national legal systems, as for instance is the case at the moment with respect to good faith in the unfair terms directive,³³ it will not be effective to achieve its aims. This would simply amount to a superficial clean-up operation.³⁴

4.2 The Competence on Which a Horizontal Instrument Will Be Based

If the option of a horizontal instrument covering both national and cross-border contracts³⁵ is implemented, then consideration must be given to the legal basis of this instrument. The Green Paper makes no mention of whether the horizontal instrument is to be based on Article 95 or on Article 153 EC. The distinction between the two different competences is relevant, since Article 153(5) EC provides for minimum harmonization when measures are taken on the basis of Article 153(4) EC.³⁶ However, when measures in the area of consumer policy are taken on the basis of Article 95 EC, minimum harmonization is not required. Article 95(3) EC only demands a high level of consumer protection, which, moreover, does not include the highest level of consumer protection within the Union.³⁷

4.3 The Form of a Horizontal Instrument

The question as to which kind of community instrument is to be used to achieve harmonization has not been raised. In order to achieve the goals that the Commission has set itself, namely, to remove fragmented rules and to enhance consumer confidence, it has been suggested that a horizontal instrument would be best contained in a regulation.³⁸ However, the symbolic aspect of a regulation may be less appealing.³⁹ As the Commission presents minimum and maximum harmonization as options, the use of a regulation may be implicitly precluded, even though it has been suggested

internal market? Is there a relationship of cause and effect? The reasons for consumers' mistrust of carrying out cross-border transactions are no doubt much more complex and deep-rooted than this. Will a harmonized European consumer law actually solve the problem? See also T. WILHELMSSON, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law', *Journal of Consumer Policy* (JCP) (2004): 317.

³³ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter und Ulrike Hofstetter* [2004] ECR I-3404.

³⁴ See WHITTAKER's response, n. 22 above, which talks of a potential and regrettable 'paper harmonization'.

³⁵ Option 1 of Question A2, Green Paper, n. 6 above, 14.

³⁶ H.-W. MICKLITZ, N. REICH & S. WEATHERILL, 'EU Treaty Revision and Consumer Protection', JCP (2004): 367, 375 et seq.

³⁷ *Id.*

³⁸ See N. REICH, 'A European Contract Law, or an EU Contract Law Regulation for Consumers?', JCP (2005): 383-407.

³⁹ See the observation contained in the Joint Response, n. 22 above, 3.

that, in the case of harmonization by means of a regulation, minimum harmonization would be possible.⁴⁰ However, it is hard to imagine how this would work in practice.

If, on the contrary, the horizontal instrument is contained in a directive, the Member States will have to transpose it into their national legal systems.⁴¹ It follows that the form of the horizontal instrument is connected to the scope of the harmonization. If the directive has minimum harmonization in mind, Member States would still be allowed to introduce more stringent rules, i.e., with a higher level of protection for consumers, than those contained in the horizontal instrument. If the directive aims at maximum harmonization, then some Member States will of course be deprived of using more stringent rules and may have to dismantle existing protection. If this were to occur, it is extremely difficult to imagine how this would help promote consumer confidence. On the contrary, this would make harmonized European consumer law distinctly less attractive.⁴²

4.4 The Scope of a Horizontal Instrument

In order to determine the scope of the potential horizontal instrument, it is necessary to identify its objectives clearly and honestly, which, in turn, is inevitably related to a debate about appropriate levels of protection. The scope of a horizontal instrument raises numerous issues of a differing nature.

- Firstly, it could relate to the issue of whether it applies to purely national situations or also to cross-border situations.
- Secondly, the substantive scope of such a horizontal instrument needs to be addressed. Should it be restricted to the eight directives, which the Commission takes into account, or should it be broader than this? Several academic responses have criticized the Green Paper's approach as too narrow.⁴³
- Thirdly, the Green Paper constantly refers to 'all consumer contracts', but it is necessary to clarify whether this means just contracts of sale as between businesses and consumers or also other contracts, such as contracts of hire, consumer

⁴⁰ REICH, n. 38 above, 404, who suggests that in the case of minimum harmonization by means of a regulation, the rule is directly applicable to internal situations. However, when a Member State wishes to introduce more stringent rules, there are two sets of rules that could be applied in principle: the European regulation and the national rules. This raises the issue as to how consumers and other parties will be able to find out which rules apply – the regulation or the more stringent national rules. This does not seem to increase consumer confidence.

⁴¹ Cf. HESSELINK, n. 14 above, 852.

⁴² See WHITTAKER, n. 22 above, 2–4; LURGER, n. 3 above. For that the idea to become acceptable, European contract law in general must be perceived as an improvement; see Manifesto Social Justice Group, n. 18 above, 670.

⁴³ See, for example, MICKLITZ & REICH, n. 22 above. See also HEUTGER, n. 14 above, 732.

- credit,⁴⁴ insurance, and the like. Will this suffice to unify a field of contract law (consumer contracts), or will it just achieve greater disintegration?
- Finally, the notion of ‘consumer’ and ‘professional’ requires elucidation. The ambit of consumer-law rules will depend, in part, on how professionals and consumers are defined.

Moreover, it is difficult to disentangle the scope of the horizontal instrument and its effects. For instance, if the option suggesting the horizontal instrument that has a limited scope – applying to cross-border contracts only⁴⁵ – is adopted, it is difficult to see how the potential horizontal instrument will lessen the alleged obstacles of fragmented rules and the regulatory gap that exist at present. Conversely, it has also been pointed out that even if the proposed instrument covers domestic and cross-border contracts, its impact is uncertain and will require adjustments from all actors involved.⁴⁶

Furthermore, the scope of a possible horizontal instrument may also have knock-on effects on the coherence of the legal discourse of private-law rules. While some may not consider that this consideration is paramount, it may also increase practical (as well as conceptual) difficulties. If an instrument covers cross-border contracts only, the bifurcation between national private-law rules and the instrument may be even greater than at present. In other words, domestic contracts will be guided by a private-law reasoning based on corrective and commutative justice with regulatory concerns that have infiltrated this legal discourse, whereas the instrument for cross-border contracts will be more regulatory in flavour.⁴⁷ It is difficult to predict whether this will matter in practice and, more specifically, whether it will lead to greater disintegration.⁴⁸ However, this possible risk should not be ignored, particularly as the Green Paper states that the purpose of the instrument is to counteract the phenomenon of disintegration in the single market.

4.5 *The Impact of a Horizontal Instrument*

The question of whether the instrument would actually lessen barriers and achieve greater consumer confidence depends on the content of the rules. These goals will

⁴⁴ The lack of regulation of usurious levels of interest in consumer credit contracts is an area that could, and some would say should, fall within the scope of such an instrument. See P. ROTT, ‘Consumer Guarantees in the Future Consumer Credit Directive: Mandatory Ban on Consumer Protection?’ ERPL (2005): 383; U. REIFNER, ‘Renting a Slave – European Contract Law in the Credit Society’, in *Private Law and the Many Cultures of Europe*, ed. T. WILHELMSSON, E. PAUNIO & A. POHJOLAINEN, n. 3 above, 309–326.

⁴⁵ Option 2 of Question A2, Green Paper, n. 6 above, 14.

⁴⁶ See s. 4 point (5) below.

⁴⁷ H. COLLINS, ‘The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher’s Stone’, ERCL (2006): 213–226.

⁴⁸ C. JOERGES, ‘The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline’, EUI Working Paper LAW, no. 12 (2004).

not be attained by the mere existence of the instrument that only applies to cross-border contracts for several reasons:

- (a) *Attractiveness*: It cannot be assumed that an instrument will necessarily be more attractive to both sets of interested parties. Cross-border contracts may become less attractive to consumers, or less attractive to businesses. This will depend on the level of protection provided in the instrument.
- (b) *Increase or decrease in consumer confidence?*: The likelihood of harmonization leading to an increase in consumer confidence is tantamount to it having the opposite effect. For instance, it is equally plausible to suggest that harmonization of cross-border contracts will decrease consumer confidence since, instinctively, consumers will prefer to use national law because they are acquainted with it. This option would then be counter-productive to the Green Paper's stated aims.
- (c) *Enforcing consumer law*: The points above also depend on the facilities available to enforce both national law and the community instrument.⁴⁹ It is highly significant that 'many respondents ask for more Alternative Dispute Mechanisms and easier access for consumers to ADRs and courts'.⁵⁰ These issues need to be discussed and the potential conflicts of interest, as between consumers and businesses, need to be examined more fully.

These ramifications tend to suggest that in order to be effective the horizontal instrument must, at the least, cover both domestic and cross-border contracts. Even then, many issues need to be explored further, and empirical evidence is required to ascertain both the impact and the effectiveness of this instrument. At present, it is difficult to predict that the horizontal instrument will achieve its end-goal of making consumer law simpler, more accessible, and more certain throughout the EU.⁵¹

5. Levels of Harmonization: Minimum or Maximum Harmonization?

In Question 3, the European Commission raises the issue of relating to the level of harmonization. The two alternatives presented by the European Commission are:

Option 1: The revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.

⁴⁹ See P. ROTT, 'Effective Enforcement and Different Enforcement Cultures', in *Private Law and the Many Cultures of Europe*, ed. T. WILHELMSSON, E. PAUNIO & A. POHJOLAINEN, n. 3 above, 291-307.

⁵⁰ See *Outcome of Public Consultation Report*, n. 8 above, 15-16.

⁵¹ LURGER, n. 3 above, 182-184. See Joint Response, n. 22 above, 4, which asks the Commission to assess the impact of this consequence in a follow-up to the Green Paper.

Option 2: The revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle.⁵²

In its *Outcome of Public Consultation Report*, the European Commission comes to the conclusion that the majority of respondents is in favour of ‘the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation’.⁵³ The Commission states further that the overall majority is in favour of full targeted harmonization.⁵⁴ It is worth noting that the Commission only uses the expression ‘full harmonization’, rather than ‘full targeted harmonization’, in the Green Paper.⁵⁵ In its view, ‘full targeted harmonization’ means ‘targeted to the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border’.⁵⁶ There is a noticeable shift in language from ‘minimum’ and ‘maximum’ harmonization to ‘full targeted’ harmonization. This indicates a shift of emphasis.

However, when the responses with respect to the question of full harmonization are studied in more detail, the situation is less homogenous than the Commission indicates. For instance, 80% of businesses support maximum harmonization (even though they do not want a European Consumer Code),⁵⁷ whereas a majority of the consumer organizations supports minimum harmonization. In this respect it is striking that the Commission does not provide a percentage for this second majority. We do not know if it is quantitatively comparable to the first figure given, or a bare majority, for example. Four Member States are in favour of minimum harmonization. However, the Commission does not specify which Member States. It would be interesting to know whether they are the Scandinavian Member States, since they have a high level of consumer protection and may be afraid that they will have to put up with a lower level of consumer protection.

The position of the European Parliament is perhaps somewhat contradictory in an attempt to achieve a compromise. First, it suggests that the horizontal instrument should start from the principle of full targeted harmonization, but subsequently, it states, according to the Commission, that the directives under review should be based on minimum harmonization. Overall, this is not very helpful.

Moreover, consumer organizations also link the issue of minimum or maximum harmonization to the content of the rules. When the rules provide a high level of consumer protection, they are not against them as such. Indeed, we agree

⁵² Green Paper, n. 6 above, 15.

⁵³ *Outcome of Public Consultation Report*, n. 8 above, 4.

⁵⁴ *Ibid.*

⁵⁵ See, for instance, Green Paper Question 3, n. 6 above, 14–15.

⁵⁶ *Outcome of Public Consultation Report*, n. 8 above, 4.

⁵⁷ *Ibid.*

that it is extremely difficult to evaluate the potential benefits or drawbacks of full harmonization in the abstract, as we need to examine the precise content of certain rules to determine what the optimum solution is and to whom it applies. In addition, full harmonization will have significant snowball effects on national private law's classifications and systems, a point that needs to be taken into consideration.⁵⁸ The level of harmonization is a primary objective that should be discussed before considering the related questions of form and scope, as the Commission has done.⁵⁹

Full harmonization will, on the face of it, achieve the Green Paper's aims of reducing national diversity, thereby increasing consumer confidence and reducing obstacles to trade. However, this statement cannot be taken at face value because it only considers the picture from a biased focal point. The Green Paper's 'rhetoric' certainly steers in this direction as the following extract illustrates:

The overarching aim of the Review is to achieve a real consumer internal market striking a balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity. At the end of the exercise it should, ideally, be possible to say to EU consumers 'wherever you are in the EU or wherever you buy from it makes no difference: your essential rights are the same'.⁶⁰

The real question, of course, is how to achieve a 'high level of protection' across the EU. This exercise is not a neutral technical legal one at all; it is axiological. In other words, what might be called a high level of protection might not be high enough according to some and too high according to others. The level of consumer protection is both a relative and variable concept depending on the standpoint of the assessor. We perceive this as a question of legal policy, as well as entailing a division of labour between the Member States and the EU.⁶¹

In parentheses, the other related question of paramount importance in relation to maximum harmonization is that of the Community's competence, or room for manoeuvre, in this area. The Green Paper refers to this issue neatly by reminding us of the 'need to respect the principle of subsidiarity'. This second 'norm-descriptive',

⁵⁸ As stated above. See also T. WILHELMSSON, 'Theses on the Task of the Member States', in *Verbraucherrecht in Deutschland – Stand und Perspektiven*, ed. H.-W. MICKLITZ (Baden-Baden: Nomos, 2005), 37–63, 56–59.

⁵⁹ Green Paper Questions A1 and A2 respectively, n. 6 above, 14.

⁶⁰ Green Paper, n. 6 above, 3.

⁶¹ WILHELMSSON, n. 58 above, 44.

or ‘norm-analytical’, approach is not the focus of our concern and has already been the object of significant academic discussion and enquiry.⁶²

As far as the legal-policy approach is concerned, scholars have already pointed out the need to discuss the Commission’s change of direction from minimum to maximum harmonization.⁶³ Once again, the Green Paper does not explicitly state that the Commission is in favour of maximum harmonization, but one does not even have to read between the lines to understand that this is the case. This is a continuous evolution, in line with the horizontal Unfair Commercial Practices Directive, which has adopted maximum harmonization.⁶⁴ To summarize, we could say that full harmonization is à la mode. However, even if fashions permeate our consciousness, it may be risky to adopt them uncritically.

Numerous criticisms can be made of this maximalist trend on various grounds; we shall focus on five non-exhaustive arguments:

- (1) It has already been shown that the internal-market justificatory arguments, advanced by the Commission in order to promote the maximalist position, are far from compelling.⁶⁵ These include preferring equal conditions of competition, activating the role of the internal-market consumer, and removing obstacles to cross-border activities. Little empirical evidence exists to support the arguments advanced, to both consumer confidence and, in particular, to reducing the transaction costs involved in existing legal diversity.
- (2) More particularly, a convincing demonstration has already been made to show that the main argument in favour of full harmonization in order to promote consumer confidence, the focus of the Green Paper, is particularly weak.⁶⁶ An important distinction must be made as to the substantive and procedural confidence of consumers. In other words, consumers may not be eager to buy across borders for practical reasons linked to access to justice and enforcement, more than due to fear of an unknown law. In short, pluralist strands of consumer confidence and consumer expectations can be identified throughout the EU. These are sometimes epitomized as diverse consumer cultures.⁶⁷

⁶² See further on this question, for example, S. WEATHERILL, ‘Maximum or Minimum Harmonization: What Kind of “Europe” Do We Want?’, in *The Future of European Contract Law*, ed. K. Bode-Woelki & W. Grosheide (Kluwer, 2007), 133-146.

⁶³ T. WILHELMSSON, ‘The Abuse of the “Confident Consumer” as a Justification for EC Consumer Law’, JCP (2004): 317, 322.

⁶⁴ Cf. UBERATH & JOHNSTON, n. 28 above, 1254; WILHELMSSON, n. 63 above, 317 & 322.

⁶⁵ See, for example, WILHELMSSON, n. 58 above, 45-51; Manifesto Social Justice Group, n. 18 above, 661.

⁶⁶ MICKLITZ & REICH, n. 22 above.

⁶⁷ T. WILHELMSSON, ‘The Average European Consumer: A Legal Fiction’, in *Private Law and the Many Cultures of Europe*, ed. T. WILHELMSSON, E. PAUNIO & A. POHJOLAINEN, n. 3 above, 243-268, with examples of European variations on 259-264.

- (3) Difficult legal questions will arise as a result of maximum harmonization. An example of this kind of difficulty, which we have called the ‘coherence of the legal discourse of private law’, has been considered above. This kind of argument, which may appear to be rather ‘systematic-oriented’, must not be played down. Details matter particularly in contract law, which is such a significant vehicle of our social and moral values⁶⁸ as well as an instrument for economic steering⁶⁹ – not least because contract law has to adjudicate conflicting private interests and decide in each particular case to whom priority should be given. A certain degree of flexibility and casuistry must be maintained to achieve this goal. Maximum harmonization may not be the best way of achieving such flexibility. Examples of the negative effects of maximum harmonization of the product liability and unfair contract terms directive have already been discussed.⁷⁰ Maximizing these directives could lead to lowering standards of protection in some Member States and engendering a sort of discrimination between consumers and commercial parties, both of which would be counter-productive to the stated aims of the Green Paper, since these consequences would neither overcome fragmentary legislation or the regulatory gap, nor promote consumer confidence. The net effect might well be a new form of further disintegration, which the Commission clearly wants to avoid. Likewise, the proposal to add in an overarching good-faith clause, in addition to maximum harmonization, looks like an attempt to clutch at straws as a last resort.⁷¹ If such a clause were to be included, would it not just create a new form of irritation,⁷² or of disintegration, that the Commission seems to find so upsetting to the good functioning of the internal market?
- (4) A penultimate argument relates to the desire to improve the quality of European legislation, an explicit goal of the Commission that has been expressed for some time.⁷³ Our present experience so far has been that the EU has created a dialogue and an exchange between the Community institutions and Member States, from

⁶⁸ R. SEFTON-GREEN, ‘Cultural Diversity and the Idea of a European Civil Code’, in *The Politics of a European Civil Code*, ed. M.W. HESSELINK, (Kluwer Law International, 2006), 71-88; R. SEFTON-GREEN, ‘Social Justice and European Identity in European Contract Law’, *ERCL* (2006): 275-286.

⁶⁹ H. COLLINS, *Regulating Contracts* (Oxford: Oxford UP, 1999); Manifesto Social Justice Group, n. 18 above, 661.

⁷⁰ WILHELMSSON, n. 58 above, 56-59.

⁷¹ Green Paper, n. 6 above, 17-18.

⁷² G. TEUBNER, ‘Good Faith in British Law or How Unifying Ends Up in New Divergences’, *Modern Law Review* (ML Rev.) (1998): 11-31.

⁷³ Communication from the Commission, ‘*Action Plan Simplifying and Improving the Regulatory Environment*’, (Brussels, 5 June 2002), COM (2002), 278 final; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, *Updating and Simplifying the Community Acquis* (Brussels, 11 February 2003), COM (2003), 71 final.

the national legislators and/or the judiciary. It has been argued elsewhere that this circulation of legal ideas and concepts helps us progress.⁷⁴ The national forms of resistance⁷⁵ are not necessarily negative; they have also helped created a dialogue between the various norm-makers. This is part of a process of legal and democratic experimentation, specific to the multi-level governance of the EU, which is part of its rich diversity.⁷⁶ The bottom-line argument against maximum harmonization is very simple: There is no going backwards; no room for improvement, and no supplementation of European legislation by national legislators will be possible any longer. This does not mean there is no going back altogether. It simply means we will have to end up relying on the judiciary to perform this task instead of national legislators. We are not going to make value judgements about this possibility, but simply wish to state the obvious, namely, that our faith in the judiciary is conditioned according to the legal culture to which we belong.

- (5) Finally, if full harmonization means lessening the present national levels of consumer protection for certain Member States, and/or creating additional diversity to the available remedies between consumer and commercial parties, its net effect will be the opposite of increasing consumer confidence in those Member States. In short, and once again, raising or lowering levels of harmonization is a political and legal policy question that cannot be disguised via a technical exercise.

In conclusion, one may wonder why the doors of the Trojan horse have only been half opened.

⁷⁴ T. WILHELMSSON, 'Private Law in the EU, Harmonized or Fragmented Europeanization?', *ERPL* (2002): 77-94.

⁷⁵ D. CARUSO, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', *ELJ* (1997): 3-32.

⁷⁶ Manifesto Social Justice Group, n. 18 above, 668 et seq.